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IN THE

United States Supreme Court

October Term, 1970

No. 112 2

METROPOLITAN FEDERAL SAVINGS AND LOAN ASSOCIATION OF NEW YORK,

Petitioner,

vs.

EAST BROOKLYN SAVINGS BANK (a/k/a METROPOLITAN SAVINGS BANK) and BREVOORT SAVINGS BANK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX TO BRIEF

	Page
Opinions Below	1
Jurisdiction	3
Questions Presented	2
The Relevant Statutes	3
Statement of the Case	4
Reasons for Granting the Writ	8
Conclusion	10

INDEX TO APPENDIX

Findings of Fact and Conclusions of Law	A1
Memorandum of Decision and Order	A9
Order and Judgment of Affirmance, November 16, 1970	A17
Order Denying Petition for Rehearing Dated December 1, 1970	A18

Cases Cited

American Brake Shoe and Foundry Company v. Alltex Products Corp., 117 F(2d) 983 (2 Cir. 1941), (Opinion by Judge Learned Hand)	12
American Foundries v. Robertson, 269 U. S. 372 (1926)	9

Federal Trade Commission v. Procter & Gamble, 386 U. S. 568 (1967) 14

Hygrade Envelope Co., In re, 366 F. (2d) 384 (2 Cir. 1966) 13

International News Service v. Associated Press, 248 U. S. 215 (1918) 11

Ochs, v. Washington Heights Federal Savings and Loan Association, 12 N. Y. 2d 82 (1963) 10

United States v. El Paso Natural Gas Co., 376 U. S. 651 (1964) 15

United States v. Gypsum Co., 333 U. S. 364 (1947) 11

United States v. Lever Bros., 216 F. Supp. 887 14

United States v. Philadelphia National Bank, 374 U. S. 321 (1963) 11, 13

United States v. Philipsburg Nat. Bank & Trust Co., 399 U. S. 350 (1970) 13, 14

Yale Electric Corp. v. Robertson, 26 F.2d 972 (2 Cir. 1928) 15

Statutes Cited

Clayton Act, Section 7, as amended in 1950 by the Celler-Kefauver Antimerger Act (15 U. S. C. 18) 3, 7, 14

Home Owners Loan Act of 1933:

12 U. S. C. §1461 7, 9
12 U. S. C. §1464(a) 3, 4, 12

PAGE

Sherman Act, Section 1 (15 U. S. C. 1) 3, 7

28 U. S. C.

1331(a) 7
1337 7

Regulation Cited

12 C. R. F. 563.1 ..... 4, 10
12 C. R. F. 563.4 10
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EAST BROOKLYN SAVINGS BANK (a/k/a METROPOLITAN SAVINGS BANK) and BREVOORT SAVINGS BANK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on November 16, 1970.

Opinions Below

The opinion of the District Court is not reported. It is set out in the Appendix together with the findings of fact and conclusions of law (A1-A16). The Court of Appeals affirmed without opinion (A17).

Jurisdiction

The judgment of the Court of Appeals was entered on November 16, 1970 (A17). A petition for a rehearing was denied by order dated December 1, 1970 (A18). The jurisdiction of this court is invoked under 28 U. S. C. §1254 (1).

Questions Presented

1. Whether the Respondent's East Brooklyn Savings Bank use of the name "Metropolitan" since October 1, 1969 is a violation of the Home Owners Loan Act and the regulations issued thereunder by the Federal Home Loan Bank Board which authorized the corporate legal name of the Petitioner to be "Metropolitan Federal Savings and Loan Association of New York," where Petitioner had been using the corporate name "Metropolitan Savings and Loan Association" since 1953 when it was chartered by New York State and "Metropolitan Federal Savings and Loan Association of New York" since 1967 when it obtained a Federal charter?

2. Whether it is a violation of the antitrust laws, Sherman Act, §1, 15 U. S. C. (1) and Clayton Act, §7, 15 U. S. C. 18, for the Respondents to merge and jointly use the name "Metropolitan Savings Bank" since July 1, 1970, as their corporate name?

3. Whether it is actionable unfair competition for the Respondents, since October 1, 1969, to adopt and use the name "Metropolitan Savings Bank" as their corporate name where the Petitioner has been in the banking business using the corporate name "Metropolitan Savings and Loan Association" since 1953 and "Metropolitan Federal Savings and Loan Association of New York" since 1967?

The Relevant Statutes

Section 1 of the Sherman Act (15 U. S. C. 1) provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

Section 7 of the Clayton Act, as amended in 1950 by the Celler-Kefauver Antimerger Act (15 U. S. C. 18) provides in pertinent part:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

Home Owners Loan Act of 1933, 12 U. S. C. 1464(a):

> "In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as 'Federal Savings and Loan Associations,' and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States."

Pursuant to this power the Board adopted a regulation, 12 C. F. R. 543.1, dealing with the names to be used by associations and the Board's review thereof:

> "The full corporate title of each Federal association shall include the words 'Federal Savings and Loan Association,' which shall be preceded by a suitable descriptive word and may be followed by the words 'of . . .' using the name of the place in which such association is organized or at which its home office is located: Provided, that the name of the place, if used, shall not include the name of the State: And provided further, that the Board shall have the right to change the name requested if, in the Board's judgment, such name is inappropriate or is not suitable."

Statement of the Case

Petitioner, "Metropolitan Federal Savings and Loan Association of New York" (hereinafter Metropolitan) was originally chartered as a savings and loan association under the laws of the State of New York in 1953 with the corporate title, "The Metropolitan Savings and Loan Association." Since 1953 Metropolitan's main office was at 75-25 Metropolitan Avenue, Middle Village, in the Borough of Queens, City and State of New York. In the year 1960, it opened a branch office at 116-22 Metropolitan Avenue, Kew Gardens, in the Borough of Queens. The offices are within two miles of each other and service the Kew Gardens and Middle Village sections of Queens.

In 1967, Metropolitan converted to a federal savings and loan association pursuant to the Home Owners Loan Act of 1933, 12 U. S. C. 1464 (a). The Federal Home Loan Bank Board authorized Metropolitan to adopt as its legal corporate name "Metropolitan Federal Savings and Loan Association of New York" (A11).

Over a period of sixteen years Metropolitan has come to be known by the abbreviated name of the "Metropolitan Savings" and the "Metropolitan" among the customers and among the trade. The words "of New York" which are included in the legal name are almost never used by the public.

Mr. Kraut, President of Metropolitan, testified as follows (96a, 97a, Appendix in Court of Appeals):

> "A. We legally are known as Metropolitan Federal Savings & Loan Association. Over the years, we have come to be known as the Metropolitan Savings, the Metropolitan, among our customers and among the trade. And this is over a period of 16 years.
>
> So that, when you refer to us as Metropolitan Savings, or Metropolitan, we are the Metropolitan Federal Savings & Loan Association. And this is the way the customers and the brokers refer to us.
>
> We have this secondary meaning.
>
> The Court: You say the public has referred to you as Metropolitan Savings?
>
> The Witness: That is correct.
>
> The Court: Which part of the public?
>
> The Witness: The public that does business with us over the counter, the depositing public, borrowing public, or brokers and lawyers that do business, that recommend loans."

Mr. Kraut also testified (58a, Appendix in Court of Appeals):

> "The Court: Mr. Kraut, do you have an opinion as to whether the depositing public understands

the difference between a savings and loan association and a savings bank?

The Witness: The depositing public knows it is a savings bank."

In all the years that Metropolitan has been in business its depositors have been insured by the Federal Savings and Loan Insurance Corporation which is the federal agency that insures both federal and state chartered savings and loan associations, just as the Federal Deposit Insurance Corporation insures the depositors in state savings banks.

The public often refers to Metropolitan as simply "Metropolitan Savings", "Metropolitan Savings and Loan Association", "Metropolitan Sayings Bank" and "Metropolitan Bank" and other variations. But whatever variation is used, the name Metropolitan is always included (A7; Finding of Fact 31b).

At no time did the authorities who regulate or who have any jurisdiction over Metropolitan object in any manner to the use of any name or designation that Metropolitan used.

Unknown to Metropolitan, East Brooklyn Savings Bank changed its corporate name to "Metropolitan Savings Bank" as of October 1, 1969. About December 9, 1969, Metropolitan became aware of this and asked East Brooklyn Savings Bank to desist from using the name. On December 9, 1969, the same day that Metropolitan requested the East Brooklyn Savings Bank to desist from using the name "Metropolitan," the Brevoort Savings Bank, again unknown to Metropolitan, requested permission from the New York State Superintendent of Banks to merge with East Brooklyn Savings Bank under the name of "Metropolitan Savings Bank". Unknown to Metropolitan, the merger negotiations between the defendants had com-

menced early in 1968. When this merger application became known to Metropolitan in the latter part of December, 1969, Metropolitan promptly notified the Superintendent of Banks and also the Brevoort Savings Bank that Metropolitan objected to the defendants' use of the name "Metropolitan" (A12).

The merger application was nevertheless approved *ex parte* effective July 1, 1970 (A13).

Metropolitan has two offices in Queens and the Respondents have nine (9) offices—eight (8) in Brooklyn and one (1) in Queens. Metropolitan has 13,000 depositors located in New York City, Nassau, Suffolk and Westchester Counties and 2,000 mortgages on properties situated in New York City and Nassau. Its deposits total $36 million (A2).

The Respondents have total deposits of $503 million and 152,000 depositors (A6).

This action was commenced by the filing of a Summons and Complaint to enjoin Respondents from using the name "Metropolitan" in the United States District Court for the Eastern District of New York on January 6, 1970. On that date the East Brooklyn Savings Bank had four offices in Brooklyn and was using the name "Metropolitan Savings Bank". The Brevoort Savings Bank had four offices in Brooklyn and one office in Forest Hills, about three miles from one of Metropolitan's two offices and was using the name "Brevoort". On July 1, 1970, the effective date of the merger, it too changed its name to "Metropolitan Savings Bank" (A5, A6).

Jurisdiction in the District Court was based on 28 U. S. C. §1331(a) and §1337, the Home Owners Loan Act of 1933, 12 U. S. C. §1461, *et seq.*, the Sherman Act, Sec. 1, 15 U. S. C.(1) and Clayton Act §7, 15 U. S. C.(18), and principles of pendent jurisdiction.

Reasons for Granting the Writ

Certiorari should be granted because important questions of law in the administration of the Home Owners Loan Act, the antitrust laws and law of unfair competition, involving the structure and dynamics of the banking industry have arisen which have not been but should be finally settled by this Court and because the decision conflicts with applicable decisions of this Court.

This case is unique and one of first impression in that it simultaneously involves violations of the law of unfair competition and the antitrust laws by the Respondents. The antitrust laws are procompetitive and intended to preserve freedom of competition. The law of unfair competition is also procompetitive in that it seeks to promote fairness in competition. The two bodies of law are not mutually exclusive. The preservation of competition requires regulation of industry structure and also industry behavior within the structure to bring about fair competitive behavior and prevent anticompetitive illegalities. In the context of the merger of the Respondents and the appropriation of Petitioner's name "Metropolitan" by the Respondents, the merger and the appropriation of the name become a synergistic force which naturally, inherently and inevitably results in predatory, unfair competition condemned by the antitrust laws, equity and the law of unfair competition, and a violation of the Home Owners Loan Act under which Petitioner was chartered.

The lower courts decided these important issues in conflict with applicable decisions of this court. Our contention is that the judgment of the Court of Appeals should be reversed, and an injunction granted enjoining the Respondents from using the name "Metropolitan" or any variation thereof. It should be held:

(1) That the merger of the Respondents and the adoption of the name "Metropolitan Savings Bank" as the

name of the new identity is a violation of the antitrust laws and of the Home Owners Loan Act and the regulations issued thereunder.

(2) That Respondents' misappropriation of the name "Metropolitan" is actionable because the law of unfair competition applies with the same full vigor to the banking industry as it does to other industries and not in any diluted manner.

First: In *American Foundries* v. *Robertson*, 269 U. S. 372, 380 (1926) this court stated:

> ". . . The effect of assuming a corporate name by a corporation under the law of its creation is to exclusively appropriate that name. It is an element of the corporation's existence. Newby v. Oregon Cent. Ry. Co., et a., Deady 609, 616; s.c. 18 Fed. Cases 38, Case No. 10,144. And as Judge Deady said in that case:
>
> > 'Any act which produces confusion or uncertainty concerning this name is well calculated to injuriously affect the identity and business of a corporation. And as a matter of fact, in some degree at least, the natural and necessary consequence of the wrongful appropriation of a corporate name, is to injure the business and rights of the corporation by destroying or confusing its identity'."

The judgment of the lower courts is in conflict with this decision. To misappropriate the trade name of a bank is to misappropriate an organic asset and erode the intrinsic identity, existence and good will of the bank.

The Metropolitan Federal Savings And Loan Association was organized pursuant to the Home Owners Loan Act of 1933, 12 U. S. C. §1461 et seq. It owes its existence

and its name to the Statute and the regulations. See 12 U. S. C. 1464(a) and 12 C. F. R. §543.1. It is noteworthy that after the approval of an application, the temporary officers of a prospective association must petition the Board, "requesting the Board to issue a charter under a name chosen by the petitioners or such other name as the Board may deem appropriate." 12 C. F. R. §543.4. The action of the Board in issuing or denying a charter is final. 12 C. F. R. §543.5.

Since Metropolitan is a federal savings and loan association, it is an instrumentality of the Federal Government and entitled to the protection of the paramount laws of the United States. *Ochs* v. *Washington Heights Federal Savings and Loan Association*, 17 N. Y. 2d 82, 86 (1966). This protection includes preemption of the name adopted for such a bank. Since Metropolitan adopted the name with the approval of the Federal Home Loan Bank Board, it is not open to appropriation by other competing banks or impairment by a state or its officers. To permit these respondents to continue to use the name "Metropolitan" is to authorize a direct conflict with the Federal Home Owners Loan Statute and the Federal regulations. It is a direct interference with the operation of the Federal Home Loan Bank system.

In recent years there has been a development in the banking industry which is highly significant with respect to the effect of the misappropriation of a smaller bank's name by a larger bank. We refer to the phenomenon of branch banking. It was one thing for a savings bank to adopt the name of a savings and loan association before the advent of branch banking. It is quite another when a conglomerate of nine savings banks, which may open further branches in the future, misappropriates the name of a savings and loan association having two branches and which also may expand in the future. They are obviously

on a collision course, since the name of a bank is an organic asset of the bank. If appropriation by a second comer is permitted, there will be a gradual erosion, whittling away and dispersion of the identity of Metropolitan in the public mind which took Metropolitan seventeen years to establish. Misappropriation could result in expropriation.

Second: This Court has held that relief against unfair competition is not limited to situations where secondary meaning has been established. *International News Svc.* v. *Associated Press*, 248 U. S. 215 (1918). Relief may be granted for misappropriation of property rights, unfairness or predatory conduct which is offensive to Equity. All these elements are found in this case.

Until 1962 the banking industry was under the impression that it was exempt from the antitrust laws. In that year this Court decided to the contrary in *United States* v. *Philadelphia National Bank*, 374 U. S. 321 (1962).

It is now time to hold that the law of unfair competition applies with all its force and not in diluted form to the banking industry.

The trial court found that secondary meaning was established with respect to the name "Metropolitan Federal Savings And Loan Association" but that without the word Federal in it there was no secondary meaning (A7; Finding of Fact 32). This was "clearly erroneous" as defined by this Court in *United States* v. *Gypsum Co.*, 333 U. S. 364, 395 (1947) for the following reasons:

The Petitioner did business under the name of Metropolitan Savings and Loan Association from 1953 to 1967 inclusive. During this period of fourteen years the word "Federal" did not appear in its name because it was

operating under a state charter. In 1967 it federalized and added the word "Federal" to its name, its full legal name becoming Metropolitan Federal Savings and Loan Association of New York.

Since the trial judge found that secondary meaning had been established by the Petitioner with respect to Metropolitan Federal Savings and Loan Association in the three years that plaintiff did business with the word Federal in its name, it must follow that in the fourteen prior years of doing business, secondary meaning had been acquired in the name "Metropolitan" without the word "Federal". Surely then, a mistake has been committed. If that is so, the adverse finding is "clearly erroneous".

The trial court also found that the word Federal in the Petitioner's name distinguishes the Petitioner's name from the Respondents' name (A16).

The law is that a generic name which has acquired secondary meaning may be adopted by a second user if another word is added to the name so as to distinguish it from the prior user's name. For instance, see *American Brake Shoe and Foundry Company* v. *Alltex Products Corp.*, 117 F(2d) 983 (2 Cir. 1941), (Opinion by Judge Learned Hand) and the Supreme Court cases cited therein. But here we have a converse situation. In this case the additional word Federal is included in the name by the first user. That does not dilute the first user's right of preemption. It expands the right of preemption.

In the case at bar the trial court turned this doctrine around as if the Respondents were the prior users and the Petitioner the second user. Since that is a misappli-

cation of a legal standard, it is a reversible error. *In re Hygrade Envelope Corp.*, 366 F(2d) 594, 598 (2 Cir. 1966).

Thus: In *United States* v. *Philipsburg Nat. Bank & Trust Co.*, 399 U. S. 350 (1970) this Court invalidated a merger between what were ostensibly two commercial banks in a small town in New Jersey where the Trial Court had characterized the activities of the banks as really being much more like the activities of savings institutions rather than commercial banks. The majority opinion of Mr. Justice Brennan noted that the merger of the two banks would produce a single bank with assets of about forty-one million dollars, that its main activities were real estate loans and mortgages and that it received more time and savings deposits than demand deposits.

The dissenting opinion of Mr. Justice Harlan noted:

> ". . . in short both banks are oriented towards the needs of small depositors and borrowers."

The Court then reaffirmed the following which is stated in *United States* v. *Philadelphia National Bk.*, 374 U. S. at p. 363:

> ". . . This intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior or probable anticompetitive effects. Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not

likely to have such anticompetitive effects. See United States v. Koppers Co., 202 F. Supp. 437 (D. C. W. D. Pa. 1962)."

The *Philipsburg* case is analogous to the case at bar. The case at bar has the added feature of the predatory act of misappropriation of the name "Metropolitan". This certainly warrants dispensing with elaborate proof of market structure, market behavior or probable anticompetitive effects such as is normally presented in the usual merger case. This is so because inherently the facts in the instant case are likely to have anticompetitive and harmful effects on Metropolitan.

The burden then is on the Respondents to convince the Court that its merger will not have the proscribed anticompetitive effect. They made no attempt to carry this burden.

Assets under §7 of the Clayton Act include Trade names. *United States* v. *Lever Bros.*, 216 F. Supp. 887. In the cited cases there is no predatory act like the conversion of an asset of a smaller bank. The wrong flows from the mere potential of the concentration of power in the new merged structure. In the case at bar, the wrong is more egregious, because there is added a direct predatory act of misappropriation of a valuable intangible asset—the name and the good will of the Petitioner bank. To be sure it is not as dramatic as the misappropriation of a tangible physical asset of the Petitioner bank. But nevertheless it is like an insidious malignant tumor—very real, more disastrous and is a classic example of an act of traditional unfair competition which if not checked at the incipiency becomes fatal. Section 7 was intended to arrest anticompetitive effects in their incipiency. *Federal Trade Commission* v. *Proctor & Gamble*, 386 U. S. 568 (1967).

It will be recalled that the assets of Metropolitan are about thirty-six million dollars and that of the Respondents together about five hundred and three million dollars.

While this action was pending and in January 1970 before the trial thereof, East Brooklyn Savings Bank spent over a quarter of a million dollars to purchase gifts to be distributed to new depositors as an inducement to open an account (A5). Metropolitan is in no position to give away that kind of money. Thus we have an instance of the anticompetitive effect of Respondents' merger from a Respondent itself. When to this is added the misappropriation of Metropolitan's name, it constitutes an illegal restraint in violation of the Clayton and Sherman Acts.

The entire merger need not be annulled but the illegality can be exercised by ordering divestiture of the name "Metropolitan" now. Since the defendants were on notice of the charges any possible objection they may have is untenable. *United States* v. *El Paso Natural Gas Co.*, 376 U. S. 651 (1964); *Yale Electric Corp.* v. *Robertson*, 267 F.2d 972 (2 Cir. 1928).

If the threat to freedom of competition caused by merger is compounded by an act of unfair competition, it is doubly inimical to the public and the Petitioner. The act of unfair competition in the traditional sense, is made that more deadly by the synergistic effects of the power of the wrongdoers which is increased through merger. This case is thus a classic instance for invoking both the protection of the antitrust laws and the Laws of Unfair Competiton to the end that competition be kept both free and fair.

In one of his famous essays entitled "Competition" published in 1913 in the *American Legal News*, Vol. 44, pp. 5 through 14, which is reproduced in a volume entitled "*The Curse of Bigness—Miscellaneous Papers of Louis*

D. Brandeis", edited by Osmond K. Fraenkel, Judge Brandeis made the following statements which are as true today as the day they were made.

> At p. 115: ". . . Competition consists in trying to do things better than someone else; that is, making or selling a better article, or the same article at a lesser cost, or otherwise giving better service. It is not competition to resort to methods of the prize ring, and simply 'knock the other man out.' That is killing a competitor."
>
> At p. 115, 116. "It will be found that wherever competition has been suppressed it had been due either to resort to ruthless processes, or by improper use of inordinate wealth and power. The attempt to dismember existing illegal trusts is not, therefore, an attempt to interfere in any way with the natural law of business. It is an endeavor to restore health by removing a cancer from the body industrial."
>
> At p. 117. ". . . and organization can never supply the combined judgment, initiative, enterprise, and authority which must come from the chief executive officers."
>
> At p. 123. "Since private monopoly is not beneficial to the community there can remain but two questions:
>
> First, can we preserve competition where it exists?
>
> Second, can we restore competition where it has been suppressed?
>
> To both the answer is, "Yes."

Judge Brandeis' statement that competition can be restored and preserved is of course not self-executing. It can be so if we will it and act to make it so. The pres-

ervation of competition in the banking industry requires that the courts not dilute the application of the law of unfair competition and antitrust law to the banking industry as the lower courts have done in this case.

Mr. Miller, the President of East Brooklyn Savings Bank, testified in his deposition that he did not even look in the telephone book and made no effort whatever to ascertain if there was another bank in existence with the name "Metropolitan" (171a, Appendix in Court of Appeals).

Mr. Smith, the Chief Executive Officer of the Brevoort Savings Bank, testified in his deposition that he too did not even look in the phone book, that since his bank was being merged into East Brooklyn, he would do whatever East Brooklyn was doing and go along with East Brooklyn in taking the name "Metropolitan" (149a, 150a, Appendix in Court of Appeals).

This is an amazing confession of insensitivity to the rights of others and of gross recklessness in selecting a name. It may be equated to a wilful taking of the name "Metropolitan". There are many fields of law where gross recklessness is equated to the commission of a wilful wrong.

The structure and dynamics of the banking industry should certainly be one of the most ethical and most discriminating. "The Curse of Bigness" should not be permitted to subvert it, especially in a case like this where the unfair competition plainly shares a common nucleus of operative fact with the antirust violation (A10).

Conclusion

In this case the lower courts misapplied both the antitrust laws and the law of unfair competition contrary to the decisions of this Court and in direct conflict with the applicable statutes and organic economic policy of the United States. Effective antitrust laws and effective laws of unfair competition must not only bring about competitive industry structure but also fair competitive behavior. The petition for certiorari should be granted.

December 15, 1970

Respectfully submitted,

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APPENDIX

United States District Court

EASTERN DISTRICT OF NEW YORK

No. 70-C-10

METROPOLITAN FEDERAL SAVINGS AND LOAN ASSOCIATION OF NEW YORK,

Plaintiff,

against

EAST BROOKLYN SAVINGS BANK (a/k/a METROPOLITAN SAVINGS BANK) and BREVOORT SAVINGS BANK,

Defendants.

Findings of Fact and Conclusions of Law

(Filed 6/8/70)

June 8, 1970.

The case having come on for trial to the court without a Jury, the court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The plaintiff is a federal savings and loan association organized under the Home Owners' Loan Act of 1933.

2. a) Plaintiff was originally organized as a savings and loan association under the Banking Laws of the State of New York in 1953.

b) Plaintiff converted to a federal savings and loan association under the name Metropolitan Federal Savings and Loan Association of New York in 1967.

3. a) In 1953, plaintiff, under the name Metropolitan Savings and Loan Association, opened its offices and banking facilities at 75-25 Metropolitan Avenue, Middle Village, in the Borough of Queens, City and State of New York.

b) In 1960, plaintiff opened a branch office at 116-22 Metropolitan Avenue, Kew Gardens, in the Borough of Queens, City and State of New York.

4. a) The plaintiff has approximately 13,000 depositors, of whom approximately 12,500 reside in the County of Queens and of whom more than fifty percent live within walking distance of the bank's two offices.

b) Plaintiff has deposits of approximately $36,000,000.

5. Plaintiff advertises its name on a billboard located at Metropolitan Avenue and 73rd Street, near its main office, and states its name as Metropolitan Savings and Loan Association. The sign is rented by the bank for $100 per year.

6. Plaintiff spends approximately $4,000 per year for direct mail advertising. The mail is directed to depositors and residents of Middle Village and Kew Gardens, in Queens.

7. In its advertising, the plaintiff uses the name or title of Metropolitan Federal Savings and Loan Association of New York or Metropolitan Federal Savings.

8. An electric sign on both of plaintiff's offices advertises its name as Metropolitan Federal Savings.

9. The name Metropolitan was adopted by the plaintiff because of its location on Metropolitan Avenue and plain-

tiff's advertisements describe it as a local institution located on Metropolitan Avenue.

10. Defendant, East Brooklyn Savings Bank, also known as Metropolitan Savings Bank (Metropolitan Savings Bank) was organized in 1860 under the name The East Brooklyn Savings Bank of the City of Brooklyn. The name was amended in 1925 to East Brooklyn Savings Bank.

11. On November 15, 1968, East Brooklyn Savings Bank filed an application with the Superintendent of Banks of the State of New York for permission to change its name to Metropolitan Savings Bank.

12. The said defendant's application stated that it believed "that the proposed change of name would describe more accurately the geographic scope of defendant's services than the present name."

13. At the time of the application, the said defendant was not aware of the existence of the plaintiff.

14. A notice of the application for the change of name to the Metropolitan Savings Bank was published in a weekly bulletin issued by the Banking Department of the State of New York on November 22, 1968.

15. The said change of name was opposed by the Manhattan Savings Bank on the ground that in 1942, it merged with a savings institution known as the Metropolitan Savings Institution.

16. The Superintendent of Banks overruled the objection and approved the change of name.

17. Sections 9014 and 9016 of the Banking Law of the State of New York provide as follows:

> §9014. Corporate name; general
>
> Except as otherwise provided in this chapter, the name of a corporation shall not be the same as the name of a corporation of any type or kind, as such name appears on the index of names of existing corporations of any type or kind in the banking department or a name so similar to such name as to tend to confuse or deceive.
>
> §9016. Change of name
>
> By resolution adopted by a vote of two-thirds of all its directors, at a meeting held for the purpose, a corporation may change its corporate name, but such change shall not be effective unless it shall have been approved by the superintendent. If the superintendent shall approve, he shall issue, under his hand and the official seal of the department, in triplicate, a certificate authorizing such change of name to become effective, and stating the time at which such change shall become effective, which certificates shall be transmitted and filed in the same manner as authorization certificates.

18. The approval of the change of name was published in the weekly bulletin of the Superintendent of Banks of the State of New York on October 3, 1969, effective at the close of business on September 30.

19. The Superintendent of Banks of the State of New York authorized the change of name to Metropolitan Savings Bank as of the close of business on September 30, 1969.

20. The defendant, Metropolitan Savings Bank, expended approximately $15,000 in changing its name on signs, stationery, and printed matter and expended a sum in excess of $250,000 in advertising its new name.

21. The defendant, Metropolitan Savings Bank, has been using this new name since October 1, 1969.

22. The defendant, Metropolitan Savings Bank, has four banking offices, all located in the Borough of Brooklyn, City and State of New York.

23. a) On December 9, 1969, the defendants applied to the Superintendent of Banks of the State of New York for permission to merge under the name of Metropolitan Savings Bank.

b) On December 22, 1969, plaintiff filed an objection to defendants' use of the name Metropolitan with the Superintendent of Banks.

24. a) The defendant, Brevoort Savings Bank, was organized in 1892 under the Banking Laws of the State of New York under the name of The Brevoort Savings Bank of Brooklyn.

b) The name of the bank was subsequently changed to Brevoort Savings Bank.

25. The Brevoort Savings Bank has five banking offices, four of which are located within the Borough of Brooklyn, City and State of New York; one of its banking offices is located at 64-02—108 Street, Forest Hills, in the Borough of Queens, City and State of New York.

Findings of Fact and Conclusions of Law

26. a) The Brevoort Savings Bank office in Forest Hills is located approximately 3 miles from the plaintiff's banking offices.

b) The Brevoort Savings Bank office is in a community separate and apart from the banking offices of the plaintiff.

c) Queens Boulevard effectively separates the communities in which the two banks are located. The plaintiff's banking offices are on the south side of Queens Boulevard separated from the communities on the north side of Queens Boulevard in which the Brevoort Savings Bank branch is located.

27. The Metropolitan Savings Bank has approximately 70,000 depositors and deposits of approximately $227,000,000.

28. The Brevoort Savings Bank has approximately 82,000 depositors and deposits of approximately $276,000,000.

29. The total depositors of the merged banks will be about 152,000 and the deposits will total approximately $503,000,000.

30. The Metropolitan Savings Bank spends approximately $40,000 a year in newspaper advertising and local radio time to advertise its services and its name.

31. a) The general public outside of the area of Middle Village and Kew Gardens are not aware of the existence of the plaintiff bank and do not associate the name "Metropolitan" when used together with a title indicating a bank with the services offered by the plaintiff bank.

b) Some depositors of plaintiff bank and mortgagors doing business with the bank have, on occasion, used the names Metropolitan Savings, Metropolitan Savings Bank, Metropolitan Savings Association and Metropolitan Bank. Such depositors and mortgagors are generally aware of the full name and title of plaintiff bank and merely use the abbreviated designations for convenience.

32. The plaintiff has failed to prove that the general public residing in Middle Village and Kew Gardens and the adjoining communities identified the name "Metropolitan" as used in the various combinations as indicating banking services offered and rendered by the plaintiff bank except when the name or title "federal" was used in such designations.

33. The plaintiff has failed to prove that the name "Metropolitan", when used in connection with any name or title indicating a savings or savings and loan institution or savings bank, has acquired a secondary meaning so as to identify such name with the plaintiff's services.

34. Plaintiff has failed to prove actual confusion brought about by the use by the defendant of the name Metropolitan Savings Bank.

35. Plaintiff has failed to prove that there is a likelihood of confusion between the name Metropolitan Savings Bank and the plaintiff's authorized name or any abbreviation or variation of the name plaintiff claims is generally used.

36. a) The defendant changed its name to Metropolitan Savings Bank and used the name since October 1, 1969 and

was not aware of the existence or use of the plaintiff's name or the use of its claimed variations earlier than December 9, 1969.

b) The adoption and use of such name was not with the intention by the defendant Metropolitan Savings Bank of palming off its services as the services of the plaintiff or trading on the name of the plaintiff or appropriating the name of the plaintiff.

c) The defendant changed its name to Metropolitan Savings Bank and used the name Metropolitan Savings Bank without any intent to deceive the public and the public has not been deceived.

37. Plaintiff has failed to offer any evidence to support its claim of violation of 15 U. S. C. §1, (Sherman Antitrust Act) and 15 U. S. C. §18 (Clayton Act §7).

CONCLUSIONS OF LAW

1. The court has jurisdiction under 28 U. S. C. §1337.

2. a) Plaintiff has failed to prove its claim of unfair competition.

b) The plaintiff has failed to prove its claim of Sherman and Clayton Act violations.

3. The defendants are entitled to judgment dismissing the complaint herein.

JACOB MISHLER,
U. S. D. J.

Memorandum of Decision and Order

(Filed 6/8/70)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

June 8, 1970.

This is an action by the Metropolitan Federal Savings and Loan Association of New York (Metropolitan Federal), a savings and loan association incorporated pursuant to the Home Owners' Loan Act of 1933, 12 U. S. C. §§1461-68, to enjoin defendant East Brooklyn Savings Bank (East Brooklyn), also known as Metropolitan Savings Bank, and Brevoort Savings Bank (Brevoort), soon to be acquired by East Brooklyn, from using the name Metropolitan as part of their corporate name. Plaintiff bases its claims for relief on the law of unfair competition and the antitrust laws, Sherman Act §1, 15 U. S. C. §1, and Clayton Act §7, 15 U. S. C. §18.[1]

JURISDICTION

During the pretrial proceedings, defendants asserted and subsequently withdrew [2] a challenge to the jurisdiction of the court over the subject matter of the action. The parties, however, cannot confer subject matter jurisdic-

[1] Plaintiff added the antitrust claim at trial.

[2] Defendants now take the position that the court has jurisdiction over the subject matter. They have, moreover, offered argument in support of the court's jurisdiction and have emphasized their interest in an adjudication on the merits. They have indicated that such an adjudication is important to the completion of their agreement to merge under the name Metropolitan Savings Bank.

tion upon the court by agreement. The issue therefore remains before the court.

The court has jurisdiction over the antitrust claim, 28 U. S. C. §1337, notwithstanding plaintiff's failure to allege in its complaint that defendants' planned merger under and use of the name Metropolitan for the purpose of pirating plaintiff's good will will have an adverse effect on commerce. In view of the late stage in the proceedings at which the antitrust claim was asserted, the absence of any claim of surprise by defendants, and the fact that this defect can easily be cured by an amendment, the court does not regard the defect as fatal. *David & David, Inc. v. Myerson*, 277 F.Supp. 973 (E. D. N. Y. 1966), *affirmed*, 388 F.2d 292 (2d Cir. 1968).

Having decided that the court has federal jurisdiction of plaintiff's antitrust claim, it is unnecessary to reach the question of whether plaintiff's unfair competition claim itself "arises under the Constitution, laws, or treaties of the United States," 28 U. S. C. §1331, or "any Act of Congress regulating commerce or protecting trade or commerce against restraints and monopolies," 28 U. S. C. §1337. First, since plaintiff's claim for unfair competition plainly shares a common nucleus of operative fact with the antitrust claim, the court would have pendent jurisdiction over it if it were based on state law. *United Mine Workers v. Gibbs*, 383 U. S. 715, 86 S. Ct. 1130 (1966). Second, even if the court were to determine that the unfair competition claim presented a federal question —a conclusion warranted in this case only if it were decided that the congressional policy manifested in the Home Owners' Loan Act of 1933 mandates the application of federal common law, *see Ivy Broadcasting Co. v. American Tel. and Tel. Co.*, 391 F.2d 486 (2d Cir. 1968); *Bartsch v. Metro-Goldwyn-Mayer, Inc.*, 391 F.2d 150 (2d

Cir.), *cert. denied* 393 U. S. 826, 89 S. Ct. 86 (1968); *Murphy v. Colonial Fed. Sav. and Loan Ass'n*, 388 F.2d 909 (2d Cir. 1967); *McFaddin Express, Inc. v. Adley Corp.*, 346 F.2d 424 (2d Cir. 1965), *cert. denied* 382 U. S. 1026, 86 S. Ct. 643 (1966); *T. B. Harms Co. v. Eliscu*, 339 F.2d 823 (2d Cir. 1964), *cert. denied* 381 U. S. 915, 85 S. Ct. 1534 (1965) the body of law applied to the claim would not differ from that applied if it were decided that state law governed the resolution of the issue. There is no appreciable difference between the federal and New York laws of unfair competition. *Blisscraft of Hollywood v. United Plastics Co.*, 294 F.2d 694, 697 (2d Cir. 1961); *Hygienic Specialties Co. v. H. G. Salzman, Inc.*, 302 F.2d 614, 619 (2d Cir. 1962).

The Facts

The plaintiff was originally chartered as a savings and loan association under the laws of the State of New York in 1953 with the corporate title, "The Metropolitan Savings and Loan Association." Plaintiff had one office, its mainoffice, at 75-25 Metropolitan Avenue, Middle Village, in the Borough of Queens, City and State of New York. In the year 1960, it opened a branch office at 116-22 Metropolitan Avenue, Kew Gardens, in the Borough of Queens. The offices are within two miles of each other and service the Kew Gardens and Middle Village sections of Queens.

In 1967, plaintiff converted to a federal savings and loan association pursuant to the Home Owners' Loan Act of 1933. The Federal Home Loan Bank Board authorized the use of the name Metropolitan Federal Savings and Loan Association of New York.

Defendant, East Brooklyn, was organized in 1860 under the name East Brooklyn Savings Bank of the City of

Brooklyn, which name was subsequently abbreviated, in 1925, to East Brooklyn Savings Bank.

On November 15, 1968, East Brooklyn filed an application with the Superintendent of Banks of the State of New York for permission to change its name to Metropolitan Savings Bank. Said defendant's application assigned as a reason for the change that the Board of Trustees of the bank believed that the proposed name would more accurately describe "the geographical scope of the bank's services than the present name." The application for the change was published in a weekly bulletin issued by the Banking Department of the State of New York on November 22, 1968. The use of the name was vigorously contested by the Manhattan Savings Bank on the ground that it had merged with a bank known as Metropolitan Savings Institution in 1942 and therefore had some right in the name Metropolitan in relation to its use in banking. The Superintendent of Banks rejected the claim and a notice of approval was published in the weekly bulletin issued by the Banking Department on August 8, 1969. On October 3, 1969, the weekly bulletin published an authorization for a change of name from East Brooklyn Savings Bank to Metropolitan Savings Bank effective at the close of business on September 30, 1969. East Brooklyn has four offices, all located in Brooklyn.

On December 9, 1969, defendants, East Brooklyn and Brevoort, applied to the Superintendent of Banks for permission to merge under the name Metropolitan Savings Bank. Brevoort has five offices, four located in Brooklyn, and one located at 64-02—108th Street, Forest Hills, Queens, New York.

On December 22, 1969, the plaintiff filed an objection to defendants' use of the name Metropolitan Savings Bank

with the Superintendent of Banks. The Superintendent approved the merger in the name Metropolitan Savings Bank effective June 30, 1970..

ANTITRUST CLAIM

Plaintiff cites *United States* v. *Philadelphia Nat'l Bank*, 374 U. S. 321, 83 S. Ct. 1715 (1963), *United States* v. *First Nat'l Bank & Trust Co.*, 376 U. S. 665, 84 S. Ct. 1033 (1964), and *United States* v. *Pabst Brewing Co.*, 384 U. S. 546, 86 S. Ct. 1665 (1966) in support of its antitrust claim. It has failed, however, to offer anything close to sufficient evidence of the effect which the proposed merger of East Brooklyn and Brevoort under the corporate name Metropolitan can be expected to have on competition among savings banks. The antitrust claim must, therefore, be dismissed.

UNFAIR COMPETITION CLAIM

In view of considerable interest of both plaintiff and defendants in an early decision on the merits and the fact that the trial has been concluded, the court will exercise its discretion in favor of assuming pendent jurisdiction over plaintiff's unfair competition claim. *United Mine Workers* v. *Gibbs*, *supra*.

The plaintiff attempted to show that the name Metropolitan has acquired a secondary meaning when used in connection with a savings institution and specifically that the public identifies the use of the name Metropolitan with the plaintiff's banking services. Where a secondary meaning is established, the likelihood of confusion is presumed and it then becomes the burden of the secondary user to show that confusion is unlikely. *Norwich Pharmacal Co.* v. *Sterling Drugs, Inc.*, 271 F.2d 569, 571 (2d Cir. 1959), *cert. denied*, 362 U. S. 919, 80 S. Ct. 671 (1960). It is plaintiff's position that variations of its corporate name,

i.e., Metropolitan Savings, Metropolitan Savings Bank, Metropolitan Savings Association, have become identified in the public mind with the plaintiff's institution. The only proof offered in support of this claim are exhibits in the form of checks mailed by the plaintiff's mortgagors. Abbreviations such as these on checks for mortgage payments do not sustain the plaintiff's position. Having failed to establish a secondary meaning in the use of variations of its corporate title, therefore, the plaintiff must show that the defendant ". . . has indulged in one of the proscribed practices which equity will enjoin," i.e., palming off, actual deception, or appropriation of another's property, in order to succeed in this action. *Norwich Pharmacal Co. v. Sterling Drug, Inc., supra*, at p. 571.

East Brooklyn has been operating under the name of Metropolitan Savings Bank since October 1, 1969. There is no showing of any attempt by East Brooklyn to palm off the services of that bank to the public as the services of the plaintiff bank.

The plaintiff has approximately 13,000 depositors, almost all of whom reside in the Borough of Queens and the majority of whom reside within walking distance of the plaintiff's two banking offices. The plaintiff's total deposits are about $36,000,000. The plaintiff does little advertising. It has a billboard, which it rents at the rate of $100 per year, and pays approximately $4,000 for direct mail advertising. The mailing is directed primarily to its depositors and to residents of the neighborhood.

East Brooklyn has approximately 70,000 depositors and deposits of approximately $227,000,000. It does extensive advertising in newspapers and on local radio at a cost of approximately $40,000 per year. Brevoort has about

82,000 depositors, with total deposits of about $276,000,000. Combined, the defendants have about 152,000 depositors and $503,000,000 in deposits.

The plaintiff first advised the East Brooklyn of its objection to the use of the name Metropolitan in defendant's corporate title by letter dated December 9, 1969. Until that time, neither defendant was aware of the existence of the plaintiff bank.

The defendants made application in good faith to the Superintendent of banks of the State of New York and relied on the Superintendent to search the index of names in the Banking Department before approving a change of name as provided by sections 9014 and 9016 of the New York Banking Law. This is not a case of the defendant attempting to appropriate or trade on the plaintiff's name. *Lincoln Restaurant Corp.* v. *Wolfies Rest. Inc.*, 291 F. 2d 302 (2d Cir.), *cert. denied* 368 U. S. 889, 82 S. Ct. 143 (1961); *Thomson Indus., Inc.* v. *Nippon Thompson Co.*, 298 F. Supp. 466, 478 (E. D. N. Y. 1968); *Metropolitan Life Ins. Co.* v. *Metropolitan Ins. Premium Fin. Corp.*, 264 F. Supp. 507 (S. D. Fla. 1966).

There is little likelihood of confusion. There is testimony that a depositor of East Brooklyn told Mr. Kraut, the president of the plaintiff bank, that he understood that there was a merger between plaintiff and Brevoort. There is also testimony that an investigating service called the plaintiff bank believing it to be the defendant bank. This is hardly evidence of confusion.[3]

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[3] The Forest Hills branch of Brevoort is approximately three miles from the plaintiff bank. The community in which the plaintiff's offices are located are separated from the community in which the Brevoort Branch is located by both distance (three miles) and lack of transportation between the communities.

Memorandum of Decision and Order

Similarity in the names of competing banks must be distinguished from similarity in the names of businesses competing in the sale of merchandise. Relatively absent from competition among banks is the likelihood of confusion often created by shops with similar names competing next door to each other or packaging their products in look-alike packages with similar labels and similar slogans. See *Maternally Yours, Inc.* v. *Your Maternity Shop*, 234 F. 2d 538 (2d Cir. 1956).

Authorization to open branches is carefully exercised. Federal savings and loan associations, as in this case, have been prone to advise the public that they are federal institutions. Depositors have learned to distinguish between a savings bank and a federal savings and loan association. This degree of sophistication permits a greater degree of similarity in names. *General Adjustment Bureau, Inc.* v. *General Ins. Adjustment Co.*, 381 F. 2d 991 (10th Cir. 1967); *Lawyers Title Ins. Co., Inc.* v. *Lawyers Title Ins. Corp.*, 109 F. 2d 35 (D. C. Cir. 1939), *cert. denied* 309 U. S. 684, 60 S. Ct. 806 (1940).

The complaint is dismissed. The Clerk is directed to enter judgment in favor of the defendants and against the plaintiff dismissing the complaint, and it is

So Ordered.

JACOB MISHLER
U. S. D. J.

Order and Judgment of Affirmance, November 16, 1970

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of November one thousand nine hundred and seventy.

Present:

HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
HON. JOHN J. GIBBONS,
Circuit Judges.

[SAME TITLE]

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order and judgment of said District Court be and they hereby are affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO
Clerk

Order Denying Petition for Rehearing Dated December 1, 1970

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[SAME TITLE]

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

December 1, 1970

IRVING R. KAUFMAN
PAUL R. HAYS
Circuit Judges

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1122

METROPOLITAN FEDERAL SAVINGS AND LOAN ASSOCIATION OF NEW YORK,

Petitioner,

v.

EAST BROOKLYN SAVINGS BANK (a/k/a METROPOLITAN SAVINGS BANK) and BREVOORT SAVINGS BANK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
Questions Presented	1
Counter-Statement of the Case	2
The Plaintiff	2
The defendant Metropolitan Savings Bank	4
Plaintiff's objection to defendant's change of name	5
The merger of defendant Metropolitan Savings Bank with defendant Brevoort Savings Bank	6
ARGUMENT:	
I—Petitioner has failed to demonstrate any special and important reasons for granting a writ of certiorari in this case	7
A. The unfair competition claim	8
B. The antitrust claim	13
II—The decisions below were in all respect correct	15
A. The unfair competition claim	15
B. The antitrust claim	20
Conclusion	20

Cases Cited

PAGE

American Steel Foundries v. Robertson, 269 U. S. 372 (1926) 9-11

International News Service v. Associated Press, 248 U. S. 215 (1918) 9

New York Trust Company v. New York County Trust Company, 125 Misc. 735 (Sup. Ct. N. Y. Co. 1925), aff'd 215 App. Div. 699 (1st Dept. 1925) 20

Norwich Pharmacal Co. v. Sterling Drug, Inc., 271 F. 2d 569 (2d Cir. 1959), cert. den. 362 U. S. 919 (1960) 8, 9

United States v. First Nat'l Bank & Trust Co., 376 U. S. 665, 84 S. Ct. 1033 (1964) 13, 14

United States v. Pabst Brewing Co., 384 U. S. 546, 86 S. Ct. 1665 (1966) 14

United States v. Philadelphia Nat'l Bank, 374 U. S. 321, 83 S. Ct. 1715 (1963) 13

Yonkers Savings Bank v. Yonkers Savings and Loan Association, 174 Misc. 973 (Sup. Ct. Westchester Co. 1940), aff'd 262 App. Div. 755 (2d Dept. 1940) 19, 20

Statutes Cited

Home Owners Loan Act of 1933, 12 U.S.C. § 1461 et seq. 12

Regulations, 12 C.F.R. § 543.1 13

15 U.S.C. § 1 (Sherman Antitrust Act) 14

15 U.S.C. § 18 (Clayton Act § 7) 14

12 U.S.C. § 1464(a) 13

U. S. Sup. Ct. Rule 19, 28 U.S.C.A. 8

New York Banking Law § 9014 ..... 5, 16, 20

New York Banking Law § 9016 16

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Questions Presented

1. Did the Court of Appeals err when it unanimously affirmed a judgment of the District Court which dismissed petitioner's complaint alleging unfair competition and violations of the antitrust laws, where the District Court had found, at the conclusion of a full trial, that petitioner had failed to prove (i) wilful misappropriation, deception,

palming off or other predatory conduct on the part of respondents; (ii) that petitioner's name had acquired a secondary meaning; (iii) likelihood of confusion; or (iv) that respondents had violated any antitrust laws.

2. Do the decisions of the District Court and the Court of Appeals raise any novel questions of law or are they in conflict with prior decisions of this Court or other Courts of Appeals so as to justify the granting of a writ of certiorari?

Counter-Statement of the Case

The Plaintiff

Petitioner Metropolitan Federal Savings and Loan Association of New York (hereinafter referred to as the "plaintiff") has two offices both of which are located on Metropolitan Avenue in the County of Queens, New York City, within two miles of each other (A2).[1]

Plaintiff was organized in 1953 as a state-chartered savings and loan association under the name "Metropolitan Savings and Loan Association" (A1). The evidence at the trial showed that plaintiff adopted the name "Metropolitan" because of its location on Metropolitan Avenue (A2, Finding No. 9; 45a) and plaintiff's advertisements emphasize and describe it as a local neighborhood institution located on Metropolitan Avenue (A2, Finding No. 9; Def. Exs. C and D; 278a-279a).

In 1967, plaintiff converted to a federal savings and loan association and changed its name to Metropolitan Federal Savings and Loan Association of New York.

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[1] Numbers preceded by a capital "A" refer to pages in the appendix included as part of the Petition for Certiorari; numbers followed by a lower case "a" refer to pages in the Appendix filed in the Court of Appeals.

Plaintiff has approximately 13,000 depositors, of whom approximately 12,500 reside in the County of Queens with a majority residing within walking distance (defined by plaintiff's president as 10 blocks or less) of one of plaintiff's two offices (A2, Finding No. 4; 46a; 84a).

Plaintiff has an annual advertising budget of approximately $4,000 which is spent almost exclusively for direct mail advertising, addressed once a year to residents of Middle Village and Kew Gardens, Queens, the two local neighborhoods in which plaintiff's two offices are situated (A2, Finding No. 6; 24a; 246a). Plaintiff does no other advertising, with the exception of a single billboard located on Metropolitan Avenue, near its main office. The sign is rented by plaintiff at a cost of $100 per year (A2; Finding No. 5).

The defendant Metropolitan Savings Bank

Respondent East Brooklyn Savings Bank (a/k/a Metropolitan Savings Bank), hereinafter referred to as "defendant", was organized as a state-chartered savings bank in 1860 under the name "The East Brooklyn Savings Bank of the City of Brooklyn". In 1925 it became known as East Brooklyn Savings Bank (A3).

On November 15, 1968 defendant filed an application with the Superintendent of Banks of the State of New York for permission to change its name to "Metropolitan Savings Bank". Defendant's application to the Superintendent of Banks explained the purpose of the proposed change of name as follows:

> "The Board of Trustees believes that the proposed change of name will describe more accurately the geographic scope of the Bank's services than the present name . . ." (A3, Finding No. 12; Def. Ex. L; 291a)

Defendant's president, Mr. Walter Miller, testified that the name "Metropolitan Savings Bank" was selected (1) because the bank wished to adopt a less "localized" name and the name "Metropolitan" appeared to be more suitable, and (2) because Mr. Miller had learned that a proposed merger of two savings banks under the name "Metropolitan Savings Bank" had been dropped and he accordingly assumed that the name was available for use by his bank (165a-170a).

The evidence at the trial showed, and the trial court expressly found, that defendant Metropolitan Savings Bank was completely unaware of the existence of plaintiff Metropolitan Federal Savings and Loan Association of New York at the time it selected the name "Metropolitan Savings Bank" and at the time of its application to the Superintendent of Banks (A3, A7; Findings Nos. 13, 36; 172a).

Notice of defendant's application for a change of name was published in a weekly bulletin issued by the Banking Department of the State of New York on November 22, 1968 (A3, Finding No. 14). The application was opposed by the Manhattan Savings Bank on the grounds that one of its predecessors had previously used the name "Metropolitan Savings Bank". After due consideration, the Superintendent of Banks overruled the objection filed by the Manhattan Savings Bank and on August 7, 1969, authorized East Brooklyn Savings Bank to change its name to Metropolitan Savings Bank effective as of the close of business on September 30, 1969 (A3, A4).

The Superintendent of Banks reviewed defendant's application for permission to change its name to "Metropolitan Savings Bank" pursuant to § 9014 of the New York Banking Law which provides in pertinent part:

> ". . . the name of a corporation shall not be the same as the name of a corporation of any type or kind, as such name appears on the index of names of existing corporations of any type or kind in the banking department or a name so similar to such name as to tend to confuse or deceive." (A4)

The Superintendent's approval of the change of name was published in the weekly bulletin of the Banking Department of the State of New York on October 3, 1969 (A4, Finding No. 18). Thereafter, defendant Metropolitan Savings Bank expended approximately $15,000 to make physical changes in its signs, stationery and other printed matter and over $250,000 in advertising its new name (A5, Finding No. 20).

Plaintiff's objection to defendant's change of name

Plaintiff's first communication to defendant objecting to its use of the name Metropolitan Savings Bank was dated December 9, 1969 (Pl. Ex. 9, 193a)—more than a year after

defendant had filed its application for permission to change its name, four months after the Superintendent had published his approval of the change and more than two months after the change had become effective. When defendant rejected plaintiff's demand that defendant cease using the name "Metropolitan Savings Bank", plaintiff filed its complaint on January 6, 1970. Although the complaint demanded a "temporary injunction", plaintiff never moved for such relief.

The merger of defendant Metropolitan Savings Bank with defendant Brevoort Savings Bank

At the time of the trial, defendant Metropolitan Savings Bank had four offices, all of which were located in Brooklyn, with approximately 70,000 depositors and $227,000,000 in deposits (A6).

Defendant Brevoort Savings Bank was an institution with approximately $276,000,000 in deposits and 82,000 depositors. It had five offices, four of which were located in Brooklyn with the fifth located at 64-01 108th Street in Forest Hills, Queens (A5, A6).

The Forest Hills branch, which is the only one of defendants' offices situated in Queens, is located at a distance of several miles or over 40 blocks from either of plaintiff's two offices (283a). Plaintiff admitted that the Forest Hills office is not within convenient walking distance of plaintiff's offices (87a, 237a) and that a depositor in plaintiff's neighborhoods would have to use two buses and walk several blocks to get to defendant's Forest Hills branch (237a-238a). In addition, the Forest Hills branch is located in a neighborhood which is divided from plaintiff's two neighborhoods by the very formidable physical barrier of Queens Boulevard (A2, Finding No. 26, 241a, 283a).

In December 1969 the two defendants applied to the Superintendent of Banks for permission to merge under the name Metropolitan Savings Bank (A5, Finding No. 23).

On December 22, 1969, plaintiff filed an objection to the defendants' use of the name Metropolitan with the Superintendent of Banks. The plaintiff's attorney wrote a letter to the Superintendent of Banks dated December 22, 1969 stating:

> "The Metropolitan Federal Savings and Loan Association objects to that part of the merger plan which proposes to use the name Metropolitan as the name of the merged bank." (272a)

Notwithstanding plaintiff's objection, on March 6, 1970 the Superintendent of Banks granted permission to the two defendants to merge under the name Metropolitan Savings Bank effective on June 30, 1970 (312a).

The Superintendent of Banks made specific findings that the merger would have no significant anti-competitive effects (Def. Ex. V, 315a) and that it would be in the public interest (Def. Ex. V, 318a). The Superintendent found that the merged institution would rank 26th out of 46 savings banks headquartered in New York City (314a) and would hold only 1.5% of total deposits and slightly more than 2% of the total offices held by mutual thrift institutions in New York City (Def. Ex. V, 316a).

ARGUMENT

I

Petitioner has failed to demonstrate any special and important reasons for granting a writ of certiorari in this case.

After the conclusion of a full trial, at which plaintiff was afforded every opportunity to prove its case, the District Court expressly found that plaintiff had failed in every respect to prove its claims of unfair competition and violations of the antitrust laws. In rendering its decision the District Court applied well-settled principles of law in

concluding that the complaint had to be dismissed for failure of proof. The Court of Appeals affirmed unanimously and denied plaintiff's petition for a rehearing.

The decision in this case is not in conflict with the decision of another Court of Appeals; it does not present any important questions of federal law which should be settled by this Court; it does not involve a decision of a federal question in a way in conflict with applicable decisions of this Court; and it does not present any departure by the courts below from the accepted and usual course of judicial proceedings. Accordingly, the within Petition should be denied. See, U. S. Sup. Ct. Rule 19, 28 U.S.C.A.

A. The unfair competition claim

At the outset plaintiff argues that the courts below misinterpreted and misapplied the common law of unfair competition in a manner inconsistent with a prior decision of this Court. This argument is not correct for the following reasons:

The trial court held that in order to establish its claim of misappropriation of its name, the plaintiff had to prove either (1) that defendant was guilty of "one of the proscribed practices which equity will enjoin, i.e., palming off, actual deception, or appropriation of another's property" (A14), or (2) that plaintiff's name had acquired a secondary meaning (A13). In so holding, the court relied on the leading case of *Norwich Pharmacal Co. v. Sterling Drug, Inc.*, 271 F. 2d 569, 571 (2d Cir. 1959), cert. den. 362 U. S. 919 (1960), where the Court of Appeals reviewed applicable principles of the law of unfair competition and made it clear that proof of secondary meaning will be dispensed with only where a defendant has engaged in "sharp or unethical business practices" (271 F. 2d at pp. 570-571). The Court of Appeals stated:

> "Hence, the first comer may prevail if he proves secondary meaning *plus* likelihood of confusion on the

one hand or that the second comer has indulged in one of the proscribed practices which equity will enjoin on the other." (271 F. 2d at p. 571) (Emphasis added)

The principles enunciated in *Norwich Pharmacal* and in the many cases which have followed it are entirely consistent with the decisions of this Court (including *International News Service* v. *Associated Press*, 248 U. S. 215 (1918), cited at page 11 of the Petition) and of other federal courts as well as the decisions of the New York courts. Plaintiff has failed to demonstrate that the case at bar raises any novel or important question of law which should be reviewed by this Court.

Plaintiff argues, however, that the principles of unfair competition, as followed by the District Court and Court of Appeals, are in conflict with the decision of this Court in *American Steel Foundries* v. *Robertson*, 269 U. S. 372 (1926).

The issue in that case was whether the Commissioner of Patents should register the word "Simplex" as a trade mark for articles made and sold by plaintiff American Steel Foundries over the objections of defendant Simplex Electric Heating Company which claimed that the word in question was the salient feature in its own name. This Court held such registration should be allowed.

Plaintiff quotes a few lines from the Court's opinion in that case (Petition p. 9), which are taken completely out of context, and then argues that this Court adopted the proposition that once a corporation has selected a name, that name may never be used by any other corporation under any circumstances.

Far from supporting the argument advanced by the plaintiff, the *American Steel Foundries* case is entirely consistent with the decisions below in the case at bar and with the precedents relied upon by the District Court.

In the *American Steel Foundries* case, this Court distinguished between a second use of a name which is completely identical in every respect with the name of an existing corporation, and a situation where less than the whole name has been used. The Court stated:

> "Where the appropriation of the corporate name is complete, the rule of the statute, by its own terms, is absolute and the proposed mark must be denied registration without more. But where less than the whole name has been appropriated, the right of registration will turn upon whether it appears that such partial appropriation is of such character and extent that, under the facts of the particular case, it is calculated to deceive or confuse the public to the injury of the corporation to which the name belongs." (269 U. S. at pp. 381-382)

The Court quoted with approval from another decision by the Commissioner admitting the word "Simplex" to registration:

> "'It is a fact that the word "Simplex" has been in such wide and varied use in this country not only as a trademark but as part of a firm or corporation name that everybody has heretofore considered something more than the word "Simplex" necessary to identify a corporation . . .
>
> "'. . . the word "Simplex" does not identify any corporation in particular, for the simple reason that it is equally the name of various corporations. In short, if one referred to "the company Simplex" without anything else, it would not be known to what he was referring. . . .
>
> "'The word involved in this case is one of a large class of words which have for a great many years been much used because of their peculiarly suggestive meaning. For other examples there are the words "Acme," "Anchor," "Champion," "Eureka," "Ex-

> relative," "Ideal," "Jewel," "Liberty," "National," "Pride," "Premier," "Queen," "Royal," "Star," "Sunlight," "Triumph," "Victor." It would be a serious matter if the law actually permitted anyone who chose to do so to organize a series of corporations with names containing these words, respectively, and thereupon virtually withdraw these words from public use as trade-marks and monopolize them by preventing their registry as such.'" (269 U. S. at pp. 383-384)

This Court then concluded that:

> "Under the facts, we are of opinion that it does not appear that the use of the word as a trade-mark upon the goods of the plaintiff will probably confuse or deceive the public to the injury of the defendant or of any other corporation. It follows that the refusal to allow the registration was erroneous." (269 U. S. at p. 384)

We submit that the word "Metropolitan" stands in the same category as the word "Simplex". Accordingly, applying the same reasoning to the case at bar, it follows that plaintiff has no right to monopolize the word "Metropolitan", especially in view of its total failure of proof on the issue of secondary meaning and likelihood of confusion. The District Court made express finding of fact that plaintiff failed to prove that its name had acquired secondary meaning (A7, Finding No. 33) or that there is any likelihood of confusion between defendant Metropolitan Savings Bank and plaintiff Metropolitan Federal Savings & Loan Association of New York or any abbreviation or variation of plaintiff's name (A7, Finding No. 35).

The decisions below are clearly not in conflict with the *American Steel Foundries* case but, on the contrary, are entirely consistent with the views of this Court, as expressed in that case.

Plaintiff also argues that the District Court misapplied the secondary meaning test, saying:

> "The trial court found that secondary meaning was established with respect to the name 'Metropolitan Federal Saving and Loan Association' but that without the word Federal in it there was no secondary meaning (A7; Finding of Fact 32). This was 'clearly erroneous' . . ." (Petition, p. 11)

Plaintiff misconstrues the finding of the District Court because the very next finding of fact states:

> "33. The plaintiff has failed to prove that the name 'Metropolitan', when used in connection with any name or title indicating a savings or savings and loan institution or savings bank, has acquired a secondary meaning so as to identify such name with the plaintiff's services." (A7)

And even if we assume that plaintiff's name had acquired some degree of secondary meaning, plaintiff failed to prove that there is any likelihood of confusion. The District Court expressly found:

> "35. Plaintiff has failed to prove that there is a likelihood of confusion between the name Metropolitan Savings Bank and the plaintiff's authorized name or any abbreviation or variation of the name plaintiff claims is generally used." (A7)

The District Court's finding is amply supported by the record and is certainly not "clearly erroneous".

Finally, plaintiff argues that defendants' use of the name "Metropolitan Savings Bank" constitutes a violation of the Home Owners Loan Act of 1933, 12 U.S.C. § 1461 *et seq.* and the regulations promulgated thereunder by the Federal Home Loan Bank Board.

Plaintiff's argument, which was never articulated in the courts below, appears to be that since plaintiff is chartered as a federal savings and loan association, its use of the name "Metropolitan" is sacrosanct and the name may not be used by any other banking institution regardless of general principles of the law of unfair competition.

However, there is nothing in the Act or in the regulations which lends the slightest support to such an argument. The statute merely states that the institutions shall "be known as 'Federal Savings and Loan Associations'", 12 U.S.C. § 1464(a) and the regulations, 12 C.F.R. § 543.1, provide that

> "The full corporate title of each Federal association shall include the words 'Federal Savings and Loan Association', which shall be preceded by a suitable descriptive word. . . ."

Surely this language cannot be construed to give plaintiff a monopoly in the use of the descriptive term "Metropolitan", absent any showing of willful misappropriation or secondary meaning and likelihood of confusion.

B. The antitrust claim

Plaintiff argues that it is a violation of the antitrust laws for the defendants to merge under the name Metropolitan Savings Bank. When plaintiff filed its objections to defendants' merger with the New York Superintendent of Banks, and again in the courts below, plaintiff repeatedly stressed that it was not objecting to the merger as such but only to the use of the name "Metropolitan Savings Bank" (294a and see also Petition for Certiorari, p. 15).

In dismissing the antitrust claim the District Court stated:

> "Plaintiff cites *United States* v. *Philadelphia Nat'l Bank*, 374 U. S. 321, 83 S. Ct. 1715 (1963), *United*

States v. *First Nat'l Bank & Trust Co.*, 376 U. S. 665, 84 S. Ct. 1033 (1964), and *United States* v. *Pabst Brewing Co.*, 384 U. S. 546, 86 S. Ct. 1665 (1966) in support of its antitrust claim. It has failed, however, to offer anything close to sufficient evidence of the effect which the proposed merger of East Brooklyn and Brevoort under the corporate name Metropolitan can be expected to have on competition among savings banks. The antitrust claim must, therefore, be dismissed."

In addition the District Court made an express finding that:

"37. Plaintiff has failed to offer any evidence to support its claim of violation of 15 U.S.C. § 1 (Sherman Antitrust Act) and 15 U.S.C. § 18 (Clayton Act § 7)." (A8)

In the cases cited by the plaintiff, the Government had offered extensive proof relating to the number of banks in the areas involved and their relative sizes, income, market shares and other factors relating to the actual and threatened anticompetitive effect of the challenged mergers. The opinions of this Court contain lengthy and meticulous analyses of relevant market statistics in support of the Court's determinations that the mergers in question should be enjoined or set aside because of their anticompetitive effect.

In the case at bar, plaintiff has offered no proof at all that the merger between defendants Metropolitan Savings Bank and Brevoort Savings Bank will have any significant impact on competition in the relevant market, however that may be defined. The proof presented by defendants showed that the Superintendent of Banks, in approving the merger, found that the merged institution would hold only 1.5% of total deposits and slightly more than 2% of the

total offices held by mutual-thrift institutions in New York City (316a), that the merger would have no significant anti-competitive impact (315a) and that it would be in the public interest (318a).

In short, this case simply does not present an issue under the antitrust laws which would warrant a grant of certiorari.

II

The decisions below were in all respects correct.

Without attempting to present a full-fledged argument on the merits, since we are only opposing a Petition for Certiorari at this stage, we nevertheless feel that a brief discussion of the merits may be helpful to the Court.

A. The unfair competition claim

As we have already noted, the District Court found, after trial, that plaintiff had failed to prove wilful misappropriation, deception or palming off, secondary meaning or likelihood of confusion.

The District Court made the following findings of fact:

> "36. a) The defendant changed its name to Metropolitan Savings Bank and used the name since October 1, 1969 and was not aware of the existence or use of the plaintiff's name or the use of its claimed variations earlier than December 9, 1969.
>
> b) The adoption and use of such name was not with the intention by the defendant Metropolitan Savings Bank of palming off its services as the services of the plaintiff or trading on the name of the plaintiff or appropriating the name of the plaintiff.
>
> c) The defendant changed its named to Metropolitan Savings Bank and used the name Metropolitan

Savings Bank without any intent to deceive the public and the public has not been deceived."

Plaintiff offered no proof to the contrary but argued in its briefs that defendant was guilty of "gross recklessness" tantamount to wilful misconduct because defendant's officers did not examine the New York City telephone books.

The evidence showed that if defendant had looked at the Manhattan telephone book, which is the leading directory in the New York metropolitan area, it would have found the following listing:

"Metropolitan Federal Savings & Loan Assn
8 Foye Pl Jersey City NJ ..... NYC# 732-4768
Nights Sun & Holidays Tenafly NJ NYC# 565-5454
Nights Sun & Holidays Nw Hyd
Pk LI ..... NYC# FI 7-6854
Night Sun & Holidays ..... BO 1-8404"
(275a)

This however, is *not* plaintiff Metropolitan Federal Savings & Loan Association of New York. This Manhattan listing happens to refer to a completely unrelated federal savings and loan association located in Jersey City, New Jersey. Not only is plaintiff *not* listed in the Manhattan phone book but the listing described above is proof that plaintiff's name is not unique and has not acquired any secondary meaning in the New York metropolitan area associating it with plaintiff.

Defendant's president, Mr. Miller, testified that in selecting its new name defendant relied on the determination by the Superintendent of Banks under Sections 9014 and 9016 of the New York Banking Law that there was no impediment to the use of such name (171a-172a).

Sections 9014 and 9016 (A4) require the Superintendent to check out a proposed name against an index of existing

institutions maintained by the banking department in order to prevent the use of any new name which is so similar to an existing name as to tend to confuse or deceive.

A defendant certainly should not be found guilty of "gross recklessness" equal to "wilful misconduct" merely because it followed the procedures set forth in the New York Banking Law and relied on the search and determination made by the Superintendent of Banks.

The District Court also found:

> "33. The plaintiff has failed to prove that the name 'Metropolitan', when used in connection with any name or title indicating a savings or savings and loan institution or savings bank, has acquired a secondary meaning so as to identify such name with the plaintiff's services." (A7)

This finding is also amply supported by the record. The evidence showed that plaintiff does very little advertising so that it was in no position to argue that its name had been so heavily publicized as to have acquired a secondary meaning in the public mind. Although plaintiff tried to rely on unfair competition cases involving the Metropolitan Opera Company and the Metropolitan Life Insurance Company, plaintiff's position in the banking industry is in no way comparable to the positions of these organizations in their respective spheres of activity.

Plaintiff's only alleged proof of secondary meaning consisted of a showing that during a period selected by plaintiff (February-April 1970) some 135 out of over 2,000 mortgagors (or less than 7%) used abbreviations of plaintiff's name on their monthly payment checks (67a-69a; 123a-130a). Surely, the District Court was not clearly in error in finding that plaintiff had failed to prove that the public regards the name "Metropolitan" as associated with the banking services offered by this particular plaintiff.

On the question of confusion, the District Court made the following findings of fact:

> "34. Plaintiff has failed to prove actual confusion brought about by the use by the defendant of the name Metropolitan Savings Bank.
>
> "35. Plaintiff has failed to prove that there is a likelihood of confusion between the name Metropolitan Savings Bank and the plaintiff's authorized name or any abbreviation or variation of the name plaintiff claims is generally used." (29a)

These findings were not clearly erroneous. On the contrary, they were amply supported by the record.

Although defendant Metropolitan Savings Bank had been using its name since October 1, 1969, plaintiff was unable to offer proof of any actual confusion during the seven months preceding the trial, other than a few alleged conversations between plaintiff's President, Mr. Kraut, and unidentified strangers (89a) and an alleged telephone call from a credit investigator, who was not called as a witness and was not subject to cross-examination (90a). While proof of actual confusion is not an indispensable requirement in an unfair competition case, the presence or absence of such proof certainly bears upon the likelihood of future confusion where, as here, the allegedly infringing name has already been in use for some time.

All of the other evidence offered at the trial showed that there is no likelihood of confusion.

Mr. Kraut testified that plaintiff had selected the name "Metropolitan" because of plaintiff's location on Metropolitan Avenue (45a) and that the majority of plaintiff's depositors reside within walking distance (10 blocks or less) of one of plaintiff's two offices on Metropolitan Avenue (84a).

Indeed, Mr. Kraut stressed that:

> "The majority of depositors of *any* bank would reside in walking distance for convenience." (224a) (Emphasis added)

The evidence at the trial also showed that plaintiff's advertising places heavy emphasis on a "save in your own neighborhood" concept (see Def. Ex. "C" and "D", 278a and 279a).

The District Court found that none of defendants' offices were sufficiently close to plaintiff's two offices to create a likelihood of confusion; even with respect to defendant Brevoort Savings Bank's Queens office, which was the closest to plaintiff's two offices, the District Court found:

> "26. a) The Brevoort Savings Bank office in Forest Hills is located approximately 3 miles from the plaintiff's banking offices.
>
> b) The Brevoort Savings Bank office is in a community separate and apart from the banking offices of the plaintiff.
>
> c) Queens Boulevard effectively separates the communities in which the two banks are located. The plaintiff's banking offices are on the south side of Queens Boulevard separated from the communities on the north side of Queens Boulevard in which the Brevoort Savings Bank branch is located." (A6)

The District Court's findings and conclusions were not only in accord with the precedents of the federal Court of Appeals but are also consistent with New York cases dealing with unfair competition between similarly named banking institutions. *Yonkers Savings Bank* v. *Yonkers Savings and Loan Association*, 174 Misc. 973 (Sup. Ct. Westchester Co. 1940) *aff'd* 262 App. Div. 755 (2d Dept.

1940); *New York Trust Company* v. *New York County Trust Company*, 125 Misc. 735 (Sup. Ct. N. Y. Co. 1925) *aff'd* 215 App. Div. 699 (1st Dept. 1925). In both of these cases the courts refused to enjoin the use of similar names despite proof, unlike here, that there had been some actual confusion.

Defendants also asked the District Court to accord some weight to the administrative expertise of the New York Superintendent of Banks, who had approved defendants' use of the name "Metropolitan Savings Bank" after complying with Section 9014 of the New York Banking Law which requires the banking department to check the index of names of existing corporations to avoid the use of a name so similar "as to tend to confuse or deceive" (A4). The District Court made several findings of fact relating to the action taken by the Superintendent (A3-A5, Finding Nos. 11 through 19, 23 and 24) but it did not predicate its decision to dismiss the complaint on the Superintendent's determination. It made its own findings and conclusions and dismissed the complaint because plaintiff had failed to prove any of the elements of an unfair competition claim.

B. The antitrust claim

With respect to the antitrust claims we can only repeat what is said at pages 13-15 of this brief. There was simply not a shred of evidence to support plaintiff's allegations, and the District Court was clearly justified in dismissing the complaint after trial.

Conclusion

Plaintiff has failed to raise any question which is of sufficient novelty or importance to warrant review by this Court.

This is simply a case of a plaintiff which made certain allegations and was unable to prove them at trial.

The District Court applied correct principles of law and made findings of fact which were not clearly erroneous but were amply suported by the record. The Court of Appeals did not err in unanimously affirming the judgment of the trial court and denying a petition for rehearing.

The petition for certiorari should, accordingly, be denied.

Respectfully submitted,

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